Supreme Court, U.S.
FILED

No. 09-998 FEB 18 2010

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In The

Supreme Court of the United States

SHAWN DRAKE,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari
To The 19th Judicial District Court,
East Baton Rouge Parish, State Of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Because of the passage of time – and the opportunity for the prosecutor to create race-neutral reasons that are not contemporaneous with a peremptory strike – should a defendant be entitled to cross examine the prosecutor and have access to the prosecutor's notes in a *Batson v. Kentucky* reconduction hearing?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

State of Louisiana, through the East Baton Rouge Parish District Attorney's Office.

Shawn Drake, an individual, a citizen, and a resident of the State of Louisiana, and the criminal defendant.

CORPORATE DISCLOSURE

The State of Louisiana is a body politic. The East Baton Rouge Parish District Attorney's Office is a subdivision of the State of the Louisiana.

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OPINIONS BELOW

The Louisiana Supreme Court denied Shawn Drake's Application for Writ of Certiorari on November 20, 2009.

BASIS FOR SUPREME COURT JURISDICTION

Shawn Drake seeks review of the judgment of the 19th Judicial District Court, East Baton Rouge Parish, State of Louisiana by Writ of Certiorari. This Court has jurisdiction under 28 U.S.C. §1257(a).

This application is timely filed under 28 U.S.C. §2101(d), as outlined in United States Supreme Court Rule 13.1.

STATUTORY PROVISIONS INVOLVED

The 14th Amendment to the United States Constitution provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

STATEMENT OF THE CASE

In 2003, Shawn Drake, an African-American, was convicted of a responsive verdict of manslaughter and felon in possession of a firearm by a 12-person jury that included a lone African-American. Drake was originally indicted for second degree murder in violation of La. R.S. 14:30.1 and felon in possession of a firearm, La. R.S. 14:95.1.

Of the other 16 prospective African-American jurors – 45 people were questioned in the selection process – seven were dismissed for cause, one was dismissed by the defendant's peremptory challenge, and eight were dismissed by the State of Louisiana's use of peremptory strikes. As a result, Caucasian jurors were significantly overrepresented on the

panel in comparison to the overall pool, while African-American jurors were grossly underrepresented.

Because of that disparity, and because the State of Louisiana exercised peremptory strikes against eight of ten eligible African-American jurors, the Louisiana Supreme Court held that the defendant established a prima facie case of discriminatory purpose. *State of Louisiana v. Drake*, 2008-1194 (La. 1/30/09), 2 So.3d 416. The court reversed an intermediate appellate court decision and remanded the matter for a reconduction hearing under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

In preparation for that hearing, Drake filed a motion to have a subpoena issued to the State to produce (1) all contemporaneous notes prepared by the assistant district attorney pertaining to jury selection; and (2) any jury questionnaires pertaining to jury selection. Appendix 51. Further, at a hearing on the motion, Drake moved orally to have the trial court order the assistant district attorney to testify under oath. Appendix 1.

The trial court denied both the motion for subpoena of the prosecutor's notes and the motion to have the prosecutor testify under oath. At this hearing, the prosecutor produced the jury questionnaires. Appendix 1.

In response, Drake filed simultaneous writ applications with the Louisiana First Circuit Court of Appeal and the Louisiana Supreme Court. Both

applications were denied, the Louisiana First Circuit Court of Appeal ruling within a few days of the trial court hearing, *see* Appendix 12, the Louisiana Supreme Court ruling on November 20, 2009. Appendix 50.

ARGUMENT

Both the passage of time – and the opportunity for the prosecutor to create race-neutral reasons that are not contemporaneous with a peremptory strike – entitle the defendant to cross examine the prosecutor and to have access to the prosecutor's notes in a *Batson v. Kentucky* reconduction hearing.

In *Batson v. Kentucky*, this Court declined "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Batson*, 476 U.S. at 99, 106 S.Ct. at 1924-1925, 90 L.Ed.2d at 89-90.

Without guidance from this Court on how to conduct *Batson* hearings – during trial or on remand – courts across the country have created a rather wide spectrum of procedural approaches, ranging from in camera ex parte discussions with the prosecutor, *see United States v. Davis*, 809 F.2d 1194 (6th Cir. 1987), *cert. denied*, 483 U.S. 1007, 107 S.Ct. 3234, 97 L.Ed.2d 740 (1987), to written submissions with oral argument, *see United States v. Alvarado*, 923 F.2d 253 (2nd Cir. 1991), *aff'd on remand*, 951 F.2d

22 (2nd Cir. 1991), to full-scale evidentiary hearings with witnesses and cross-examination, *see Salazar v. State*, 795 S.W.2d 187 (Tex. App. 1990).

These uneven approaches fail to adequately ensure compliance with the principles of *Batson* and result in a conflict between the states and the federal courts. *United States v. Jiminez*, 983 F.2d 1020 (11th Cir. 1993), *cert. denied*, 510 U.S. 925, 114 S.Ct. 330, 126 L.Ed.2d 276 (1993) (upholding a *Batson* hearing in which the defense counsel was denied an opportunity to cross examine the prosecutor after the prosecutor provided race-neutral explanations for his challenges, concluding that "[g]iven the court's need to observe judicial economy, it was not an abuse of discretion to decline to conduct a mini-trial on the credibility of the prosecutor in this case"; *United States v. Garrison*, 849 F.2d 103, 106 (4th Cir. 1988), *cert. denied*, 488 U.S. 996, 109 S.Ct. 566, 102 L.Ed.2d 591 (1988) ("Defendant's insistence on an evidentiary hearing in which prosecutors and defense attorneys and possibly other witnesses would be examined and cross examined misconceives the *Batson* inquiry. Although a district court could conduct such a hearing if it believed circumstances warranted it, *Batson* does not require this intrusion on the trial proceedings"); *State v. Jackson*, 322 N.C. 251, 368 S.E.2d 838 (1988), *cert. denied*, 490 U.S. 1110, 109 S.Ct. 3165, 104 L.Ed.2d 1027 (1989) ([w]e know of no reason why the defendant should be allowed to examine a prosecuting attorney at a post-trial hearing if he could not do so at trial).

While most courts conduct an evidentiary hearing on reconduction remand, admittedly few go so far as to require that the prosecuting attorney testify under oath or be subject to cross-examination. However, because of the passage of time and because the prosecutor has the opportunity to create race-neutral reasons that are not contemporaneous with a peremptory strike, the defendant should be always entitled to cross examine the prosecutor and have access to the prosecutor's notes. The procedure should be uniform among the country's courts, not merely available based upon geographic location. Moreover, requiring the prosecutor to testify under oath and be subjected to cross-examination is a procedure that this Court should order, particularly when in the typical peremptory challenge inquiry, the decisive question is whether counsel's race-neutral explanation for a peremptory challenge should be believed. The best evidence on that issue often will be the demeanor of the attorney who exercises the challenge. *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). *See also Batson*, 476 U.S. at 98, n. 21, 106 S.Ct. at 1724, n. 21 ("Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.").

The prosecutor's credibility is at greater issue because of the passage of time. For instance, here, Drake was convicted seven years ago. In that time, memories fade. Even notes become stale. But in this

case, as perhaps in most, it is "unrealistic to believe that the prosecutor could now recall in greater detail his reasons for the exercise of the peremptory challenges in issue, or that the trial judge could assess those reasons, as required, which would demand that he recall the circumstances of the case, and the manner in which the prosecutor examined the venire and exercised his other challenges." *People v. Garcia*, 77 Cal.App.4th 1269, 92 Cal.Rptr.2d 339 (Cal. App. 4 Dist. Div. 3, 2000). This reason alone is sufficient to support the argument that the prosecutor's memory should be challenged by cross-examination and the production of contemporaneously taken trial notes.

Ordinarily the need for the explanation by the prosecutor will arise in the course of jury selection. In those situations, simply requiring the prosecutor to explain his reasons for the challenge will suffice. There is no firm need at this point to disrupt the trial proceeding by subjecting the prosecutor to cross-examination. Yet, one court, believing the need for full disclosure of a prosecutor's intent and motive in exercising peremptory strikes, has gone so far as to adopt the cross-examination approach during a *Batson* hearing during trial. The Texas Court of Criminal Appeals in *Williams v. State*, 767 S.W.2d 872 (1989), held that an accused, when producing evidence of a prima facie case of discrimination, should have opportunity to call witnesses, including the prosecutor as an adverse witness for direct examination.

> If the trial court concludes that the accused has established a prima facie case under *Batson* and requires the prosecutor to offer racially neutral explanations for the exercise of peremptory challenges, then an accused should not be denied the right to cross-examine the prosecutor to attempt to rebut those explanations offered by the prosecutor. Since the accused bears the ultimate burden of persuading the trial judge that the discrimination allegations are true, the denial or improper curtailment of cross-examination, in our view, denies to an accused the right to a fair trial.

Williams, 767 S.W.2d at 874.

When the trial court must carry out a reconduction hearing, a more adversarial approach is needed. The defendant's due process rights and the trial court's necessity to carry out the rule of *Batson*, mandate an adversarial hearing in which the prosecutor should testify under oath. *See Gray v. Maryland*, 317 Md. 250, 562 A.2d 1278 (Md. 1989) (Moreover, where there has been the passage of considerable time between the event and the attempt at reconstruction, there may be present an increased danger of perfectly innocent confabulation, which in turn may lead the trial judge to decide that cross-examination, and even cross-examination under oath, would be appropriate). *See also Salazar v. State*, 795 S.W.2d 187 (1990) and *Marshall v. State*, 593 So.2d 1161 (Fla. 2d DCA 1992).

Cross-examination of the prosecutor is appropriate because it enjoys an exalted position in the adversary system of justice and is the "greatest legal engine ever invented for the discovery of the truth." 5 *Wigmore on Evidence* §1367 at 29 (3d ed. 1940). Moreover, cross-examination provides the trial judge the opportunity to evaluate both the demeanor and veracity of the prosecutor, who in cases such as this, must attempt to reconstruct non-racial reasons that may have evaporated through the passage of time.

The prosecutor enjoys no special privilege as a witness. Rather, the prosecutor is a competent witness, and more often than not, the best witness to shed light upon the reasons for peremptory strikes. That prosecutor should be subject to the vigors of cross-examination when the passage of time places the integrity of the entire *Batson* process at issue. While as an officer of the court the prosecutor's professionalism and candor should be expected, the prosecutor's memory may be suspect. Even a well-intentioned prosecutor can have a lapse over time for remembering the idiosyncrasies or mannerisms of a potential juror that caused the prosecutor to use a peremptory strike.

One final reason calls for a rule that requires the prosecutor to testify subject to cross-examination and to produce contemporaneously-taken trial notes. Courts have found that given the passage of time, even a hearing to determine whether jurors were improperly excluded may well be unsatisfactory. In those circumstances in which the court determines a

hearing cannot be satisfactory for determining the issue, the defendant should get a retrial. *Rosa v. Peters*, 36 F.3d 625 (7th Cir. 1994). If courts see fit to require a new trial because the passage of time between a trial and a *Batson* reconduction hearing may lead to an unsuccessful hearing, then the courts should be willing to require the prosecutor to testify subject to cross-examination as to the reason(s) for exercising a peremptory strike.

CONCLUSION

The uncertainly among the courts as to what procedure to employ in a *Batson* reconduction hearing should prompt this Court to grant this writ of certiorari. In doing so, it should then hold that the defendant has both the right to cross examine the prosecutor and to compel the prosecutor to produce any trial notes.

Respectfully submitted,

MARK D. PLAISANCE
(*Counsel of Record*
for Petitioner)

NINETEENTH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
CRIMINAL SECTION

* * * * * * * * * *

STATE OF LOUISIANA *

VERSUS * NUMBER: 9-02-168

SHAWN DRAKE *

* * * * * * * * * *

RULING

THURSDAY, SEPTEMBER 17, 2009

THE HONORABLE ANTHONY MARABELLA,
JUDGE PRESIDING

APPEARANCES:

JEFF TRAYLOR FOR THE STATE OF LOUISIANA

MARK PLAISANCE FOR THE ACCUSED

REPORTED AND TRANSCRIBED BY:

JACQUELINE L. MOORE, CCR
(CCR #87076)

[2] THURSDAY, SEPTEMBER 17, 2009

REPORTER'S NOTE: AT THIS TIME, THE DEFENDANT, SHAWN DRAKE, IS REPRESENTED BY COUNSEL, MR. MARK PLAISANCE. AT THIS TIME, MR. JEFF TRAYLOR, ASSISTANT DISTRICT ATTORNEY, IS PRESENT FOR THE STATE OF LOUISIANA.

THE COURT: LET'S GO ON THE RECORD. THIS IS GOING TO BE – IS THIS – THIS ISN'T THE FILE. WHAT IS THIS? WHERE'S SHAWN DRAKE? OKAY. LET'S GO ON THE RECORD. THIS IS GOING TO BE – I NEED MY GLASSES – STATE OF LOUISIANA VERSUS SHAWN DRAKE. THIS IS BILL NUMBER 9-02-0168. THIS MATTER IS NOT ON TODAY'S DOCKET. IT IS ACTUALLY SET FOR MONDAY. THIS MATTER WAS ON APPEAL TO THE LOUISIANA SUPREME COURT. THE LOUISIANA SUPREME COURT REMANDED IT BACK TO THE COURT FOR A HEARING TO HAVE A BATSON HEARING. THE COURT HAD PREVIOUSLY RULED AT TRIAL THAT THERE HAD BEEN NO PATTERN OF DISCRIMINATION AND THE COURT DID NOT MOVE ON TO THE NEXT STEP. THE SUPREME COURT HAS INDICATED THAT – TO THE COURT THAT THE THRESHOLD IS SO LOW THAT ONE APPARENTLY CAN STUMBLE OVER IT AND SHOULD MOVE ON TO THE SECOND STAGE, SO THE COURT IS – IS PREPARED TO MOVE ON TO THAT SECOND STAGE AND, THAT IS, TO GIVE THE PROSECUTOR AN OPPORTUNITY TO INDICATE TO THE COURT WHAT RACE NEUTRAL REASONS IT MAY HAVE HAD FOR EXCLUDING EIGHT PARTICULAR JURORS. THEN, OF COURSE, THE DEFENSE WILL, ALSO, HAVE AN OPPORTUNITY TO PUT ON OR SAY WHATEVER IT IS THAT THEY WANT TO BRING FORWARD AT THAT TIME TO SHOW THAT PERHAPS THOSE REASONS WEREN'T

RACE NEUTRAL. I HAVE SET FOR [3] MONDAY A HEARING TO HAVE THAT HEARING. I HAVE DISCUSSED IN CHAMBERS WITH COUNSEL FOR BOTH SIDES THE PROCEDURE I INTEND TO USE AND THE PROCEDURE THAT I INTEND TO USE – WELL, THERE HAVE BEEN SEVERAL REQUESTS FILED BY THE DEFENSE THAT I WANT TO RULE ON TODAY. ONE OF WHICH, THE DEFENSE HAS REQUESTED THAT THEY BE PROVIDED WITH THE HANDWRITTEN NOTES BY MR. TRAYLOR AT THE TRIAL. THE COURT DOES NOT BELIEVE THAT THEY ARE ENTITLED TO THAT. THE COURT IS GOING TO DENY THAT MOTION. THEY, ALSO, HAVE FILED A – AND I'M NOT SURE, MR. PLAISANCE, BECAUSE I DON'T HAVE IT BEFORE ME – AT LEAST, I'M NOT LOOKING AT IT RIGHT NOW. WE DISCUSSED IN CHAMBERS THE TWO ISSUES THAT YOU'RE CONCERNED ABOUT. ONE IS YOU WANT THE PRODUCTION OF THE NOTES. DID YOU ACTUALLY FILE A MOTION TO QUESTION MR. TRAYLOR OR IS THAT SOMETHING –

MR. PLAISANCE: NO. I – I DID NOT FILE A FORMAL MOTION TO THAT, YOUR HONOR. I'LL DO SO NOW, –

THE COURT: OKAY.

MR. PLAISANCE: – IF NEED BE, ORALLY. I DID ADDRESS IT IN THE MEMO.

THE COURT: OKAY.

MR. PLAISANCE: ONE MORE THING, THOUGH, TO GO BACK A STEP, ON THE SUBPOENA I, ALSO, ASKED FOR THE JURY QUESTIONNAIRES. I DID NOT ADDRESS THAT NECESSARILY IN THE MEMO TO YOUR HONOR BECAUSE, IN DISCUSSIONS WITH MR. TRAYLOR WE HAD HAD [sic] WHETHER WE COULD RESOLVE THIS CASE, HE HAD INDICATED HE WOULD PROVIDE ME THAT, SO I DIDN'T –

MR. TRAYLOR: YOUR HONOR, –

[4] **THE COURT:** DO WE HAVE THOSE?

MR. TRAYLOR: YOUR HONOR, WHAT –

THE COURT: IF WE – YOU'RE ENTITLED TO THOSE AND YOU CERTAINLY WILL GET THOSE.

MR. TRAYLOR: WHAT – WHAT HAD OCCURRED, YOUR HONOR, IS I'M ASSUMING THAT MR. STEVENS WHITE'S FILE HAS DISAPPEARED SOMEWHERE. I DID HAVE THE JURY QUESTIONNAIRES AND I DID PRODUCE A COPY – CREATED A COPY AND I CAN GIVE THAT TO DEFENSE COUNSEL –

THE COURT: OKAY.

MR. TRAYLOR: – RIGHT NOW BECAUSE IF – I DON'T KNOW IF IT MADE IT INTO THE COURT RECORD OR NOT, BUT THEY – THE DE – DEFENSE DEFINITELY SHOULD HAVE THAT, AND SO THEY DO –

THE COURT: PARKER, WE HAVE THOSE, DON'T WE? DIDN'T WE –

THE LAW CLERK: WE DO.

THE COURT: OKAY. WELL, YOU – YOU ARE CERTAINLY ENTITLED TO THOSE –

MR. PLAISANCE: WELL, I'VE GOT THOSE –

THE COURT: – AND YOU HAVE THOSE NOW.

MR. PLAISANCE: – SO THAT'S NOT AN ISSUE.

THE COURT: OKAY.

MR. PLAISANCE: I JUST WANTED TO CLEAR IT UP –

MR. TRAYLOR: AND –

THE COURT: OKAY.

MR. PLAISANCE: – IN CASE WHEN IT GETS TO APPELLATE COURT OR IF ANY OTHER COURT LOOKS AT THE MOTION –

THE COURT: OKAY.

[5] **MR. PLAISANCE:** – ITSELF.

THE COURT: SO WE – WE'VE CLEARED THAT UP. YOU DO HAVE NOW THE JURY QUESTIONNAIRES.

MR. PLAISANCE: RIGHT. MY SECOND ARGUMENT, YOUR HONOR, OR MY POINT AS YOU – AS YOU INDICATED, I'LL MAKE AN ORAL MOTION TO THAT EFFECT. I DID ADDRESS IT IN THE MEMO. I BELIEVE, BASED ON MY RESEARCH – UH – AS I POINTED OUT, LOUISIANA DOES NOT PROVIDE A WEALTH OF GUIDANCE ON HOW TO PROCEED. LOOKING AT OTHER STATES, I BELIEVE, WHEN IT'S ON REMAND AS COMPARED TO CONTEMPORANEOUS AT THE TIME IT OCCURS, THAT THE DISTRICT ATTORNEY MUST TAKE THE STAND AND BE SUBJECT TO CROSS-EXAMINATION; AND I THINK LOGICALLY THEREAFTER THE NOTES WOULD BE AVAILABLE.

THE COURT: OKAY. THE COURT'S RULING ON THOSE TWO ISSUES ARE AS FOLLOWS – AND I WILL TELL YOU THE PROCEDURE THAT I'M GOING TO USE. IT'S THE COURT'S INTENTION ON MONDAY TO PROCEED AS FOLLOWS. THE COURT IS GOING TO PROCEED BASICALLY JUST AS THE SUPREME COURT INDICATES I SHOULD HAVE PROCEEDED ON THE MORNING OF TRIAL WHEN THE BATSON CHALLENGE WAS ISSUED; AND THAT IS I'M GOING TO REQUIRE MR. TRAYLOR TO STATE FOR THE RECORD RACE NEUTRAL REASONS FOR THE EIGHT JURORS, THE EIGHT AFRICAN-AMERICAN JURORS, THAT WERE EXCLUDED PEREMPTORILY FROM THE JURY. I'M GOING TO ASK HIM TO MAKE THOSE RACE

NEUTRAL REASONS AND TO GIVE ME THOSE REASONS. AND I HAVE COPIES – I HAVE THE TRANSCRIPT AND I WILL REFER TO THE TRANSCRIPT TO DETERMINE WHETHER OR NOT THERE EXISTS THE REASONS THAT HE SUGGESTS. IF THE REASONS THAT HE SUGGESTS [6] ARE NOT CLEAR IN THE RECORD, I WILL ASK HIM TO – AND HE RELATES TO ME THAT THOSE ARE IN HIS NOTES, I WILL ASK HIM TO SUBMIT IN CAMERA THOSE NOTES SO I CAN INSPECT THOSE NOTES TO VERIFY THAT, IN FACT, THOSE EXISTS [sic]. IF THEY DO, DEPENDING ON HOW I RULE, THE COURT WILL CERTAINLY REQUIRE THOSE NOTES OR, AT LEAST, A COPY OF THOSE NOTES BE MADE PART OF THE RECORD FOR ANY APPEAL. I DO NOT INTEND TO ALLOW THE DEFENSE TO EXAMINE THOSE NOTES. THE COURT WILL EXAMINE THOSE NOTES, HOWEVER. THE COURT IS GOING NOT TO REQUIRE MR. TRAYLOR TO TAKE THE STAND TO BE SUBJECT TO CROSS-EXAMINATION OR OTHERWISE. I BELIEVE THAT IT WOULD BE INAPPROPRIATE AND I'M VERY CONCERNED ABOUT A PROCEDURE THAT WOULD REQUIRE A LAWYER WHO IS A COMBATANT IN A CASE TO ANSWER QUESTIONS ABOUT POTENTIAL TRIAL STRATEGY AND OTHER THINGS AND I THINK THAT ALL GOES INTO JURY SELECTION. AND, IF THERE IS A POSSIBILITY THAT THIS CASE MAY BE RETRIED, I WOULD IMAGINE MR. TRAYLOR WOULD BE THE APPROPRIATE PERSON TO TRY

IT; AND I THINK TO SUBJECT HIM TO CROSS-EXAMINATION ABOUT POTENTIAL AREAS OF – OF – OF WHAT WAS GOING ON, I THINK, IS – IS – IS NOT APPROPRIATE. I DO NOT BELIEVE THAT IT'S NECESSARY. I DO NOT THINK IT'S APPROPRIATE FOR HIM TO BE CALLED AND I'M NOT GOING TO ALLOW HIM TO BE CALLED. IF THE SUPREME COURT FEELS OTHERWISE OR IF THE SUPREME COURT HAS A BETTER PROCEDURE FOR THIS COURT TO FOLLOW, I WILL LISTEN TO THAT. SO I AM DENYING BOTH MOTIONS, ONE ORALLY AND ONE IN WRITING, TO PROVIDE THE – THE – THE REPORT – THE NOTES OF MR. TRAYLOR TO [7] THE DEFENSE AS WELL AS TO ALLOW HIM TO BE CALLED ON CROSS-EXAMINATION AT A HEARING.

MR. PLAISANCE: YOUR HONOR, I RESPECTFULLY ASK FOR A STAY OF MONDAY'S PROCEEDINGS SO THAT I CAN TAKE AN EMERGENCY WRIT TO THE FIRST CIRCUIT AND CONCURRENTLY TO THE SUPREME COURT ON THIS MATTER.

THE COURT: OKAY. THE COURT IS GOING TO DENY THE STAY, BUT I WILL GIVE YOU TIME TO PERFECT YOUR WRIT. DO YOU WANT A – HOW LONG DO YOU WANT?

MR. PLAISANCE: AT LEAST – I THINK WE'RE SCHEDULED FOR MONDAY AFTERNOON. IS THAT CORRECT?

THE COURT: I DON'T KNOW WHAT TIME.

MR. TRAYLOR: PROBABLY MONDAY MORNING AT 10:00.

THE COURT: PROBABLY 10:00 O'CLOCK, I WOULD THINK.

MR. PLAISANCE: 9:00 O'CLOCK MONDAY MORNING?

THE COURT: OKAY.

MR. PLAISANCE: THAT'LL GIVE THEM UNTIL – IT'LL BE FILED BEFORE, BUT JUST IN CASE –

THE COURT: ALL RIGHT.

MR. PLAISANCE: – SOMETHING HAPPENS.

THE COURT: OKAY.

MR. PLAISANCE: I'M GOING TO NOTIFY THEM TODAY THAT IT'S COMING AND –

THE COURT: WHAT TIME – WHY DON'T WE DO THIS? JUST TO GIVE YOU SOME TIME, WHY DON'T WE SET THIS AT 1:00? WHY DON"T WE HAVE THIS HEARING AT 1:00? THAT'LL GIVE YOU THE MORNING.

MR. PLAISANCE: YEAH. THANK YOU, JUDGE.

THE COURT: SO I – I WILL GIVE YOU TILL NOON [8] TO PERFECT YOUR WRITS AND OBTAIN A STAY FROM THE SUPREME COURT.

MR. PLAISANCE: THANK YOU.

THE COURT: WHY DON'T WE – WHY DON'T WE RE-SET THIS FOR 1:00 O'CLOCK –

MR. PLAISANCE: THANK YOU, YOUR HONOR.

THE COURT: – MONDAY AFTERNOON? THAT'LL GIVE EVERYBODY AN OPPORTUNITY TO DO WHAT THEY NEED TO DO.

MR. PLAISANCE: WELL, AND – AND IT MAY TAKE ME A COUPLE HOURS TO GET A COPY OF THIS TRANSCRIPT AND THE MINUTE ENTRIES.

THE COURT: ALL RIGHT. I DON'T THINK THE TRANSCRIPT – WE AIN'T GOT MUCH TO TRANSCRIBE.

THE REPORTER: HUH-UH.

THE COURT: HUH?

THE REPORTER: I'VE JUST GOT TO GET THEM TO DUMP THE F. T. R. THAT MIGHT BE THE LONGEST.

THE COURT: OKAY.

MR. PLAISANCE: THANK YOU, JUDGE.

THE COURT: ALL RIGHT.

END OF TRANSCRIPT

[9] CERTIFICATE

I, JACQUELINE L. MOORE, OFFICIAL COURT REPORTER, 19TH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, DO HEREBY CERTIFY THAT THE FOREGOING 8 PAGES CONSTITUTE A TRUE AND CORRECT TRANSCRIPT OF THE AFORESAID MATTER AS TAKEN BY ME ON THE STENOTYPE MACHINE, TO THE BEST OF MY KNOWLEDGE AND ABILITY.

WITNESS MY HAND, THIS 17TH DAY OF SEPTEMBER, 2009.

/s/ Jacqueline L. Moore
JACQUELINE L. MOORE
OFFICIAL COURT
REPORTER, CSR
19TH JUDICIAL
DISTRICT COURT
(CCR #87076)

STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT

STATE OF LOUISIANA NUMBER 2009 KW 1718

VERSUS

SHAWN DRAKE SEPTEMBER 18, 2009

In Re: Shawn Drake, applying for emergency supervisory writs and for stay, 19th Judicial District Court, Parish of East Baton Rouge, No. 09-02-0168.

BEFORE: PARRO, KUHN, AND McDONALD, JJ.

STAY DENIED. WRIT DENIED.

RHP
JEK
JMM

COURT OF APPEAL,
FIRST CIRCUIT

/s/ Rod M. Naquin
DEPUTY CLERK
OF COURT
FOR THE COURT

2 So.3d 416, 2008-1194 (La. 1/30/09)

Supreme Court of Louisiana.
STATE of Louisiana
v.
Shawn DRAKE.
No. 2008-K-1194.

Jan. 30, 2009.

PER CURIAM.

Granted. The decision of the court of appeal is reversed, and this case is remanded to the district court for purposes of providing the state with an opportunity to offer race-neutral reasons for the exercise of eight of the state's peremptory challenges to exclude African-American jurors from the panel selected to try defendant's case and for a ruling by the trial court on the question of whether race played a role in the selection of defendant's jury.

The trial court found that defendant had failed to satisfy the first step in the three-part test of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) because he did not make a prima facie showing of discriminatory purpose. However, the Supreme Court "did not intend the first step to be so onerous that a defendant would have to persuade the judge – on the basis of all the facts, some of which are impossible for the defendant to know with certainty – that the challenge was more likely than not the product of purposeful discrimination." *Johnson v. California*, 545 U.S. 162, 170, 125 S.Ct. 2410, 2417, 162 L.Ed.2d 129 (2005). A defendant "satisfies the

requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Id.*

In the present case, the state excluded peremptorily eight out of the 10 eligible African-American jurors called for examination after the court excused seven other African-American jurors for cause. As a result, and even accounting for the state's selection of two African-American jurors for the panel, one of whom the defendant then struck, Caucasian jurors were significantly overrepresented on the panel in comparison to their number in the overall tally of jurors called for examination, and African-American jurors were grossly underrepresented.

These circumstances give rise to a reasonable inference of discriminatory purpose, although they might not support a finding that more probably than not race played a role in the state's exercise of its peremptory challenges. *Johnson* expressly cautioned that "[t]he Batson framework is designed to produce actual answers to suspicions and inferences that discrimination may have infected the jury selection process. . . . The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question." *Johnson*, 545 U.S. at 172, 125 S.Ct. at 2418.

Defendant may appeal again on the *Batson* question in the event of an adverse ruling from the trial court.

VICTORY, TRAYLOR and KNOLL, JJ., would deny the writ.

2008 WL 2082143 (La.App. 1 Cir.)

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeal of Louisiana,
First Circuit.
STATE of Louisiana
v.
Shawn DRAKE.
No. 2008 KA 0002.

May 2, 2008.

Appealed from the 19th Judicial District Court, in and for the Parish of East Baton Rouge, Louisiana, Trial Court No. 09-02-0168, Honorable Anthony Marabella, Judge.

Doug Moreau, District Attorney, Lori Nunn, Stacy L. Wright, Assistant District Attorneys, Baton Rouge, LA, for State of Louisiana.

Katherine M. Franks, Abita Springs, LA, for Defendant-Appellant, Shawn Drake.

Shawn Drake, Winnsboro, LA, In Proper Person, Defendant-Appellant.

Before CARTER, C.J., PETTIGREW, and WELCH, JJ.

PETTIGREW, J.

Defendant, Shawn Drake, was charged by grand jury indictment with second degree murder, a violation of La. R.S. 14:30.1 (Count One), and felon in possession of a firearm, a violation of La. R.S. 14:95.1

(Count Two). Defendant entered a plea of not guilty and was tried before a jury. As to Count One, the jury determined that defendant was guilty of the responsive offense of manslaughter, a violation of La. R.S. 14:31. As to Count Two, the jury determined that defendant was guilty as charged.

The State instituted habitual offender proceedings against defendant, seeking to have him adjudicated a second felony habitual offender. Following a hearing, the trial court found defendant to be a second felony habitual offender and sentenced defendant to a term of twenty years at hard labor for his conviction of manslaughter (Count One). The trial court also sentenced defendant to a term of ten years at hard labor without the benefit of probation, parole, or suspension of sentence, and a $1,000.00 fine for his conviction of felon in possession of a firearm (Count Two) to be served consecutive to his manslaughter sentence.

Defendant appeals, citing the following assignments of error:

1. The trial judge erred in not finding a pattern of racially motivated peremptory challenges by the prosecutor when the prosecutor utilized eight of his peremptory challenges to excise blacks from the jury and exercised cause challenges only against black venire members. The use of race as the criterion for the selection of a jury deprived Shawn Drake of a jury representative of the racial makeup

of the metropolitan area where the offense took place and of his right to Equal Protection of law.

2. The trial judge erred in providing the [S]tate with cause challenges against black venire members during jury selection and absenting himself from the jury selection process during the exercise of peremptory challenges against persons in the third jury panel. The actions of the judge in providing an unrequested cause challenge to the prosecutor as well as determining that the selection process was race-neutral without the prosecutor being required to provide reasons for the exercise of the challenges was error that casts doubt on the integrity of the selection process in addition to providing the [S]tate with an extra challenge. The absence of the judge during the exercise of peremptory challenges gave the defense no opportunity to complain and left a defective record on appeal.

3. Defense counsel was ineffective in:

    a. Failing to object after each African-American was removed from the jury by the prosecutor, noting specifically that the challenged persons' responses were no different from responses given by white venire members who were chosen for the jury.

b. Failing to object to the accumulation of challenges against black venire members and asking for a reseating of all challenged jurors.

c. Failing to object to the trial judge's suggestion made to the prosecutor regarding a challenge for cause he would grant if made.

d. Failing to object to the absence of the trial judge and the conducting of the second portion of the third round of jury selection without the judge's presence or without a contemporaneous recording.

Defendant filed a pro se brief raising the following assignments of error: 1. Defendant's adjudication as a second felony habitual offender was invalid, where it was based on a count dismissed from the prior bill of information; 2. The trial court failed to advise defendant of his rights under La. R.S. 15:529.1(D)(1); and 3. The bill of information from defendant's prior conviction was not amended to show the offense to which defendant pled guilty on May 12, 1998.

FACTS

On May 29, 2002, Ashley Lee and her boyfriend, Trey Brown, had an argument at the Suburban Apartments in Baton Rouge that escalated into a fight regarding Lee's activities with another man. Following this incident, Lee's brother, Lionel Douglas,

arrived at the Suburban Apartments, and knocked on the door of an apartment where defendant was visiting an acquaintance. Douglas and defendant left, but returned a short time later. When the two men returned, there were a good number of people milling about in a common area near the parking lot of the complex.

Tanisha Brown, the sister of Trey Brown, called to Lee from outside her first-floor apartment. Tanisha accused Lee of calling her brother (Douglas) to come over and fight Trey. According to Tanisha, Lee was standing on a second-floor balcony when she responded by cursing and threatening her. At that time, Douglas and Trenton Payne began arguing in the parking area. Defendant was with Douglas.

The verbal argument escalated into a physical confrontation involving defendant and Marcus Ghoram, who had accompanied Payne to the complex. Lee and her sister, Nina, were also seen having some involvement in this confrontation. At the same time, Douglas and Payne were also fighting each other.

Soon thereafter shots were fired. Witnesses saw defendant pointing a gun at the crowd. More shots were fired and Ghoram fell to the ground, while defendant fled. As a result of receiving a gunshot wound to his chest, Ghoram died. Defendant was subsequently charged with second degree murder.

Defendant did not testify at trial.

JURY COMPOSITION

In his first assignment of error, defendant argues the trial judge erred in not finding a pattern of racially motivated peremptory challenges when the prosecutor utilized eight of his twelve peremptory challenges to excise blacks from the jury and exercised cause challenges only against black venire members.[1]

The propriety of striking prospective minority jurors with peremptory challenges was addressed in *Batson v. Kentucky,* 476 U .S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The proper reviewing process for a *Batson* claim was recently described by the Supreme Court as follows:

> A defendant's *Batson* challenge to a peremptory strike requires a three-step inquiry. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, "[t]he second step of this process does not demand an explanation that is persuasive, or even

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[1] In brief, defendant fails to provide any argument regarding the propriety of the trial court's granting of cause challenges to the State, other than prospective juror Frankie James.

> plausible"; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination. This final step involves evaluating "the persuasiveness of the justification" proffered by the prosecutor, but "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike."

Rice v. Collins, 546 U.S. 333, 338, 126 S.Ct., 969, 974, 973-974, 163 L.Ed.2d 824 (2006) (citations omitted). A reviewing court owes the district judge's evaluations of discriminatory intent great deference and should not reverse them unless they are clearly erroneous. *Hernandez v. New York,* 500 U.S. 352, 364, 111 S.Ct. 1859, 1868, 114 LEd.2d 395 (1991); *Batson,* 476 U.S. at 98, n. 21, 106 S.Ct. at 1724; *see State v. Dunn,* 2001-1635 pp. 7-8 (La.11/1/02), 831 So.2d 862, 869. *See also State v. Draughn,* 2005-1825, pp. 20-21 (La.1/17/07), 950 So.2d 583, 600, *cert. denied,* ___ U.S. ___, 128 S.Ct. 537, 169 LEd.2d 377 (2007).

In the present case, the voir dire record shows that a total of forty-five people were questioned in the selection process. The court called three panels consisting of fourteen prospective jurors. Following the completion of the questioning of the third panel, only two seats and an alternate remained unfilled, so only three more prospective jurors were called and questioned. These final three jurors completed the jury panel and alternate.

The voir dire shows that the first panel of prospective jurors was composed of ten Caucasians and four African-Americans. The trial judge granted the State's challenges for cause against Harry Robinson and Larry Spears, two African-Americans. The State then exercised peremptory challenges against Charlene Butler (African-American), Robert Riley (Caucasian), and Shawanda Sanders (African-American). The defense counsel exercised peremptory challenges against Charlene Dean, Karen Russell, Presley Frederick, Deborah Fuller, and Leslie Graham, who were all Caucasians.

The prosecutor then made a reverse *Batson* objection to the defense counsel's use of peremptory challenges. In response, defense counsel argued,

> I think it's obvious the jury panel is predominantly white; and, once you take out the two who were excluded for cause which were black jurors, that only leaves one black juror who he's issued a peremptory challenge. So, I mean, I couldn't challenge anybody if I –

The trial court then stated that the *Batson* objection was "a little premature."

The second panel of fourteen prospective jurors was then called. This panel consisted of seven Caucasians and seven African-Americans. The State was granted challenges for cause on jurors Michelle Mullens, Norwood Booker, and Don Williams, who

were all African-Americans. Defendant was not granted any challenges for cause.

The State then exercised peremptory challenges against Leonard Paige, Cleo Washington, and Joseph Sterling, all African-Americans. Defendant exercised peremptory challenges against Ada Michelli, Jimmy Stockton, and Hans Armstrong, all Caucasians.

Following these challenges, the prosecutor again urged his *Batson* objection and defense counsel also urged a *Batson* objection. In support of his *Batson* objection, defense counsel argued that the State had used five of six peremptory challenges against black jurors and that the City of Baton Rouge was predominantly black and the Parish of East Baton Rouge was forty to forty-five percent black. However, defense counsel acknowledged that the jury panels had been "overwhelmingly white."

The trial court again denied the *Batson* objections stating, "I think that both sides – I believe both sides are exercising their – their peremptory challenges cautiously and – and without, at least, on its surface, any racial prejudice because we do have a mix here. But I note both of [your opportunities] to argue that at the later point."

The third panel of fourteen prospective jurors was then called. This pan el [sic] was comprised of eight Caucasians and six African-Americans. The State was granted two challenges for cause against Frankie James and Maxine Jefferson, both African-Americans. Defense counsel was granted a

challenge for cause against Joseph Lejeune, a Caucasian.

The State then exercised peremptory challenges against Monica Atkins, an African-American, Jacqueline Bell, an African-American, Jerrold Grantham, a Caucasian, and Ernestine Wade, an African-American. The State later "backstruck" Stacey Terry and Herbert Riche, both Caucasians. Defense counsel exercised peremptory challenges against Theresa Hunter, Kip Leblanc, and Joseph Guidroz, all Caucasians, and Willie Matthews, an African-American.

At this point, only two seats and an alternate seat remained to be filled. The trial court called three more prospective jurors for questioning, Willie Bordelon, Jerry Bumpus, and Melvin Unkraut, all Caucasians. All three were selected to serve on the jury, with Melvin Unkraut being selected as the alternate juror.

The next morning, prior to the presentation of evidence, defense counsel made a *Batson* objection to the selection of the jury. Defense counsel also argued that the State used peremptory challenges to exclude all black members (with the exception of Donald Stewart, the sole African-American juror) from serving on the jury. Defense counsel maintained that after he had exhausted his peremptory challenges, there were only three Caucasian prospective jurors remaining, and the prosecutor used that opportunity to strike two more Caucasian prospective jurors to make it appear as if his use of peremptory challenges

was not racial in nature. Defense counsel argued that the racial composition of the jury, eleven Caucasians and one African-American, was not reflective of the racial composition of the City or Parish of East Baton Rouge.

In denying the *Batson* objection, the trial court stated,

> First off, let me say that the law does require a prima facie showing of some sort of prejudice in picking the jury. I want the record to reflect that this court perhaps at the objection of both sides participated actively in the voir dire selection of this jury. I believe that there were a lot of questions placed to this jury in terms of their ability to make decisions about certain elements of this case. I do recall frankly several – at least one, perhaps more than one, black juror that the State did not peremptorily except and you did peremptorily except them. The court, first off, does not believe that there's been a prima facie showing that there has been any racial discrimination. However, if there is, the court finds, as a result of my participation and observation of the jury selection, that whatever peremptory challenges were made on behalf of the State were done in a race neutral fashion.

At the outset, we note that the trial judge determined defendant did not bear his burden of proving the first step of *Batson,* i.e., that a prima facie case of purposeful discrimination existed. Thus,

the burden never shifted to the prosecution in the second step of the *Batson* analysis, requiring the State to provide a race-neutral explanation for its peremptory strikes. Our inquiry becomes whether the trial court erred in finding that the defendant failed to present a prima facie case of purposeful discrimination.

The United States Supreme Court addressed what types of permissible inferences of discrimination were sufficient to establish a prima facie case of discrimination as required by the first step of *Batson* in *Johnson v. California,* 545 U.S. 162, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005). In *Johnson,* the Supreme Court reiterated that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire, members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the

petit jury on account of their race. *Johnson,* 545 U.S. at 169, 125 S.Ct. at 2416-2417.

On appeal, defendant asserts that as an African-American, he was a member of a cognizable racial group and that the prosecutor exercised peremptory challenges to remove from the venire eight other members of his racial group. As recognized by *Johnson,* the defendant may rely on the fact that the peremptory challenges, by reason of the fact that they may be subjectively based, constitute a jury selection practice that may allow those who intend to discriminate, to do so. However, the only evidence put forth during the *Batson* objection by defendant that would support an inference of discrimination was the defense counsel's contention that one African-American juror on the panel of twelve was not reflective of the African-American majority population of the City of Baton Rouge, nor the forty to forty-five percent African-American population of East Baton Rouge Parish.

Accordingly, we must examine what, if any, other relevant circumstances were present that could have raised an inference that the prosecution's use of peremptory challenges against the minority prospective jurors was discriminatory. This same issue was recently addressed by the Louisiana Supreme Court in *Draughn,* wherein the court held that "the mere invocation of *Batson* when minority prospective jurors are peremptorily challenged in the trial of a minority defendant does not present sufficient evidence in this case to lead to an inference of purposeful

discrimination." *Draughn,* 2005-1825 at 25-26, 950 So.2d at 603-604.

The burden of production in the first step of *Batson* is squarely on the defendant. *Johnson,* 545 U.S. at 170-171, 125 S.Ct. at 2417. In the present case, defense counsel only argued that the one African-American juror was not reflective of the racial composition of the area. However, in *Draughn,* the supreme court, applying the factors used in *Johnson,* noted certain relevant circumstances, which were apparent to the trial court, negated a finding of discriminatory intent on the part of the prosecutor in exercising peremptory challenges. *Draughn,* 2005-1825 at 26, 950 So.2d at 603. These circumstances included the nature of the case, the timing of the defendant's *Batson* objection, the trial court's opportunity to take into account the tenor of the voir dire questioning, whether the prosecution used its peremptory challenges to strike all of the prospective African-American jurors from the pool of potential jurors, and the trial court's finding of whether or not it found discriminatory intent. *Draughn,* 2005-1825 at 26-28, 950 So.2d at 603-604.

In applying these considerations, we note that the nature of this case presents no overt racial overtones. Both the victim and the defendant were from the same cognizable racial group.

Second, the trial court considered defendant's general *Batson* objection. In order to preserve a complaint that the prosecutor's use of a peremptory

exception was based on race, the defense must make an objection before the entire jury panel is sworn. *State v. Williams,* 524 So.2d 746 (La.1988) (per curiam). Although the trial court stated that "this objection was not made yesterday while we were picking the jury," the record indicates defense counsel indeed raised a *Batson* objection following the exercise of peremptory challenges for the second panel of prospective jurors. However, the trial court still considered defendant's objection made prior to the presentation of evidence and issued a ruling.

Third, in denying the defendant's *Batson* challenge on the basis that defendant had failed to make a prima facie case of discrimination, the trial judge indicated he had actively participated in the voir dire questioning, and that he believed, "there were a lot of questions placed to this jury in terms of their ability to make decisions about certain elements of this case." Clearly, the trial judge took into consideration the tenor of the voir dire questioning.

On appeal, defendant alleges that the prosecutor directed multi-part questions to prospective black jurors more often than prospective white jurors. We note that in *Miller-El v. Dretke,* 545 U.S. 231, 261-262, 125 S.Ct. 2317, 2337-2338, 162 LEd.2d 196 (2005), disparate questioning of prospective jurors or "trick" questions designed to allow prosecutors to manufacture race-neutral reasons for removing jurors are factors that would support a finding of purposeful discrimination. In *Miller-El v. Dretke,* prospective white jurors were not asked to explain their answers,

while prospective minority jurors were questioned intensely, and prospective minority jurors were read a "graphic script" regarding imposition of the death penalty, while nonminority prospective jurors were given a general explanation of capital punishment.

In the present case, defense counsel cites no place in the record that would illustrate that the minority prospective jurors were "targeted" for more questioning or certain types of questions that nonminority jurors were not asked to answer. Moreover, we have thoroughly examined the voir dire record and note that the prosecutor questioned many of the jurors in the same manner, including the use of compound questions and answers based on certain hypothetical situations.[2]

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[2] Specific examples of this include:

Charlene Butler, an African-American juror peremptorily challenged by the State, was provided a hypothetical situation of whether she could render a guilty verdict based on testimony of one witness. Ryan Empson, Thomas Desporte, and Samuel Hazlip, all Caucasians, and Donald Stewart, an African-American, who were all selected for jury service, were asked the same type of question, in much the same manner.

Shawanda Sanders, Leonard Paige, and Jacqueline Bell, African-American jurors peremptorily challenged by the State, were asked about how their determination of guilt would be affected by the State's failure to produce a weapon in much the same manner as Carolyn Seab, a Caucasian selected to serve, was questioned about the same issue.

(Continued on following page)

Fourth, we note that the State did not strike all of the African-American prospective jurors through use of its peremptory challenges. The record indicates that the State was granted challenges for cause on Harry Robinson, Larry Spears, Michelle Mullens, Norwood Booker, Don Williams, Frankie James, and Maxine Jefferson, all African-Americans, and the defense peremptorily challenged Willie Matthews, an African-American.

Finally, the trial court noted that based on its participation in voir dire, it did not believe there was any discriminatory intent in the prosecutor's use of his peremptory challenges. Like the court in *Draughn,* 2005-1825 at 28, 950 So.2d at 604, we note that the prosecution's use of a peremptory challenge cannot be separated from the context in which the challenge arises, a context which the trial judge is in the best position to evaluate. Our review of the voir dire as a whole shows no error in the trial court's finding that there was no prima facie showing of

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Finally, the record indicated that the prosecutor asked a compound question regarding if anyone had a problem with the mandatory life sentence for second degree murder and their ability to render a guilty verdict in light of that sentence, This compound question was asked to Cleo Washington, Monica Atkins, and Ernestine Wade, African-Americans who were peremptorily excused by the State, and Ryan Empson, Laura Parnell, and John White, Caucasians selected to serve on the jury.

purposeful discrimination met by the defense in its *Batson* objection.

Further, we note that we have already determined that there was no disparate questioning of the jurors based on their race, nor does the voir dire record reveal any "trick" questions designed to elicit some race-neutral response for removing jurors. Moreover, there was no procedure utilized by which juror placement on panels could be manipulated in order to reach nonminority prospective jurors before minority prospective jurors. Finally, we note that there was no evidence presented indicating a historical practice of racial discrimination in the selection of juries in East Baton Rouge Parish, as was present in *Miller-El v. Dretke,* 545 U.S. at 263-266, 125 S.Ct. at 2338-2340.

Accordingly, this assignment of error is without merit.

ABSENCE OF THE TRIAL JUDGE

In this argument raised within the defendant's second assignment of error, he contends that the trial judge's absence from the bench permitted a defective record in the face of a challenge to the selection process.

The incident at issue occurred after completion of questioning of the third panel of prospective jurors. The attorneys had presented their respective challenges for cause, which were ruled upon by the trial

judge. At this point, the trial judge and the attorneys began discussing completion of the final three seats on the jury.

Before the completion of the peremptory challenges to the remaining jurors and the determination of how many more prospective jurors would need to be questioned, the prosecutor requested a moment to study his final peremptory challenges. The transcript then reflects the following:

> THE COURT: Take your time. Yeah. Go ahead. Go ahead. I'm going to slip out for a second and go to the bathroom.
>
> THE COURT: It looks like you all might get to leave. We're not sure yet.
>
> REPORTER'S NOTE: At this time, the court left the courtroom and then returned.
>
> THE COURT: Are you ready?

At this point in time, the prosecutor questioned the trial judge about another issue unrelated to jury selection and there was an off-the-record discussion. When the parties resumed proceedings on the record, the trial court indicated which jurors from the third panel would be excused. Comparing the previous portion of the transcript regarding which jurors were being excused for cause, it is evident that the State used peremptory challenges to remove Monica Atkins, Jacqueline Bell, Ernestine Wade, all African-Americans,

and Jerrold Grantham, a Caucasian.[3] The defendant peremptorily challenged Theresa Hunter, Kip Leblanc, Joseph Guidroz, all Caucasians, and Willie Matthews, an African-American.

Clearly, the only thing that occurred during the trial judge's absence was the parties determined which jurors they would be peremptorily challenging. The trial court only granted these challenges when it returned from its break. The record does not reflect any objection to the exercise of these peremptory challenges by either the prosecutor or defense counsel. The jurisprudence of the supreme court indicates that such a failure to contemporaneously object to the use of peremptory challenges waives an equal protection complaint. *See State v. Potter,* 591 So.2d 1166, 1168-1169 (La.1991). However, we further note that despite defense counsel's failure to object to these peremptory challenges, the trial judge heard defense counsel's general *Batson* objection the following morning prior to the presentation of evidence.

Defendant also contends that the trial judge's absence permitted a defective record in the face of a challenge to the selection process. In support of this contention, defendant cites to *State v. Pinion,* 2006-2346 (La.10/26/07), 968 So.2d 131 (per curiam), wherein the Louisiana Supreme Court reversed a defendant's conviction because the record failed to

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[3] The State later used its final peremptory challenges to backstrike Herbert Riche and Stacey Terry, both Caucasians.

include transcripts of the bench conferences during jury selection.

The instant case is not at all like the situation in *Pinion.* In the present case, the entire voir dire proceedings are transcribed. Although the trial court absented himself for a brief period, it is evident that the only thing occurring at that time was the respective attorneys' own procedures for determining how their final peremptory challenges would be used. The record is clear as to which jurors were excused based on what type of challenge.

This argument is without merit.

CHALLENGE OF FRANKIE JAMES FOR CAUSE

In this argument in defendant's second assignment of error, defendant maintains the trial judge specifically asked the prosecutor if he had any other challenges for cause following the State's challenge of Maxine Jefferson for cause, and the prosecutor responded, "No. I have no other challenges for cause." Defendant argues the trial court then joined in the selection process by asking the prosecutor, "You obviously challenge Mr. James?" The prosecutor then replied that he did.

On appeal, defense counsel maintains that this question equated to the "erroneous allowance" of a challenge for cause to the prosecution, and thereby

gave the prosecution more challenges than it was entitled.

We disagree. Defense counsel takes the exchange between the trial court and the prosecutor completely out of context. It is clear that the system used by the trial court was to allow the prosecutor, then the defense counsel, to question prospective jurors. Sometimes, the trial court itself asked the prospective jurors specific questions regarding their qualifications for jury service. The trial court then held a conference with the attorneys and they indicated which prospective jurors they were requesting to be excused for cause. The trial court then allowed the parties to attempt to rehabilitate some of these specific prospective jurors by recalling them and allowing further questioning.

In this specific instance, the trial court had finished questioning Joseph Lejeune. The attorneys then approached the bench to inform the trial judge of their challenges for cause. The first juror challenged by the prosecutor during this conference was Maxine Jefferson. It was clear the trial judge intended to recall Jefferson for clarification of her opinion on whether she could convict, despite the State's failure to introduce the murder weapon, and her view of justifiable homicide (self-defense). The trial court then asked the prosecutor if he had any other challenges for cause, to which the prosecutor indicated he had no other challenges for cause. The trial court then asked the prosecutor, "You obviously challenge Mr. James?" and the prosecutor replied "Yes."

Defense counsel then indicated that he wished to challenge Lejeune and Guidroz for cause. Clearly the transcript indicates that the trial court was going to allow these prospective jurors to be recalled so the parties could further question them regarding their qualifications for jury service.

Based on our review of the record, it is clear neither the trial court, nor either attorney, saw any need to attempt to rehabilitate James. During voir dire questioning, James responded to the prosecutor's question of whether the mandatory life sentence for a second degree murder conviction was fair by stating, "I don't know. It's hard to say." James was asked to speak louder. The prosecutor then asked James, if after listening to all the evidence, he found beyond a reasonable doubt that the defendant was guilty of murder, could he return a guilty verdict knowing that defendant would be imprisoned for the rest of his life. James responded, "I really can't say." James continued to give a few more vague responses or no oral response to the prosecutor's further questions.

The prosecutor then acknowledged James's apparent reluctance and specifically asked James if there was something he wanted them to know. James responded that he had concerns about the issue of the lack of a weapon to be presented as evidence. When pressed, James stated, "I think you should have all the evidence before you can really find somebody guilty." The prosecutor then attempted to rehabilitate James by asking a hypothetical question about if other witnesses testified they saw a weapon but the

actual weapon was never produced, if that would change his view. James then replied, "I really wouldn't want to say whether he was guilty or not guilty if all the evidence – if they don't have the weapon. . . ." Once again the prosecutor clarified by asking James directly if there was no weapon, could he not arrive at a finding of guilt beyond a reasonable doubt, to which James indicated he could not.

It is evident that James would not be able to apply the law in this case, which is clearly a ground for a cause challenge. La.Code Crim. P. art. 797(4). The State is not required to produce a murder weapon in a prosecution for second degree murder. Given the context of the trial court's inquiry, we find the trial court was merely trying to ascertain which prospective jurors would be recalled for further questioning concerning their qualifications. Because James made it evident that he could not apply the law as given, we do not find the trial court's question rose to the level of providing the prosecution with an "extra" challenge.[4]

This assignment of error is without merit.

---

[4] Despite defendant's assertion that the trial court improperly granted an additional challenge for cause to the prosecution regarding James, the record indicates that *defense counsel* had selected James to be peremptorily challenged. Once James was excused for cause, defense counsel did not have to use this peremptory challenge to remove James from the jury. Arguably, the trial court's action provided *an additional peremptory challenge to the defense.*

INEFFECTIVE ASSISTANCE OF COUNSEL

In defendant's third assignment of error, he maintains he received ineffective assistance of counsel, contending that his trial counsel failed to object after each African-American was removed from the jury by the prosecutor, noting specifically that the challenged persons' responses were no different from responses given by white venire members who were chosen for the jury and that the trial counsel failed to object to the accumulation of challenges against black venire members and ask for a reseating of all challenged jurors. Defendant also maintains that his trial counsel's failure to object to the trial judge's suggestion of a cause challenge to the prosecutor, and to the absence of the trial judge during a portion of the third round of jury selection, constituted ineffective assistance of counsel.

In *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 LEd.2d 674 (1984), the United States Supreme Court established a two-fold test to evaluate claims of ineffective assistance of counsel. First, the defendant must show that counsel committed errors so serious that he or she was not functioning as the "counsel" guaranteed a defendant by the Sixth Amendment. Second, the defendant must show that the errors were so serious as to deprive him of a fair trial, one with a reliable result. *See Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. Defendant must make both showings in order to prove that counsel was so ineffective as to require reversal of the conviction.

A claim of ineffective assistance of counsel is more properly raised by an application for post-conviction relief where a full evidentiary hearing may be conducted. Only where the record disclosed sufficient evidence to decide the issue of ineffective assistance of counsel when raised by an assignment of error on appeal, may it be addressed in the interest of judicial economy. *State v. Lockhart,* 629 So.2d 1195, 1207 (La.App. 1 Cir.1993), *writ denied,* 94-0050 (La.4/7/94), 635 So.2d 1132. The investigation of strategy decisions requires an evidentiary hearing and, therefore, cannot possibly be reviewed on appeal. *See State v. Martin,* 607 So.2d 775, 788 (La.App. 1 Cir.1992).

We have previously determined that there was no error in the trial court's finding that defendant failed to prove a prima facie case of discrimination by the prosecutor's use of his peremptory challenges. We have also determined the trial court's questioning of whether the prosecutor intended to challenge Frankie James for cause did not equate to unfairly allowing the prosecution another challenge. Finally, we also determined that the trial court's absence prior to ruling on the final peremptory challenges by either party was not an error. Trial counsel's failure to object to the actions enumerated by defendant on appeal in no way deprived defendant of a fair trial. Accordingly, we cannot say that trial counsel was ineffective.

This assignment of error is without merit.

PRO SE ASSIGNMENTS OF ERROR

Defendant filed a pro se brief raising several assignments of error with respect to his adjudication as a second felony habitual offender. First we note defendant's assignments of error regarding inaccuracies in the habitual offender bill of information and the bill of information regarding his prior conviction have no merit. The record in this matter clearly reflects defendant was originally charged with carjacking, but entered a plea to the offense of second degree battery. Moreover, the bill of information regarding defendant's habitual offender status clearly sets for the correct conviction concerning defendant's prior offense of second degree battery, which was entered on May 12, 1998, under docket number 10-97-618, in the Nineteenth Judicial District Court for East Baton Rouge Parish.

Finally, defendant argues the trial court failed to advise him of his rights under La. R.S. 15:529.1(D)(1). Although the record does not contain evidence that defendant was arraigned on the habitual offender bill, our jurisprudence holds that while a defendant may not be advised of the specific allegations in a habitual offender bill of information or of his right to be tried to the truth thereof, any such error was harmless, because the defendant did not plead guilty or stipulate to the charges in the habitual offender bill. Instead, a habitual offender hearing was conducted, wherein the State actually proved the truth of the allegations and the defendant's identity. Therefore, while the trial court may not have fully complied

with La. R.S. 15:529.1(D)(1), by failing to inform the defendant of his rights, under the circumstances presented herein, we find that any such error is harmless. *State v. Mickey,* 604 So.2d 675, 678 (La.App. 1 Cir.1992), *writ denied,* 610 So.2d 795 (La.1993).

Accordingly, these assignments of error are without merit.

WELCH J. dissents with reasons.

WELCH, J., Dissenting.

I respectfully disagree with the majority opinion in this case because the trial court erroneously denied the defendant's *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) challenge to the selection of the jury. The defendant established a *prima facie* case of purposeful discrimination, and therefore, the trial court should have shifted the burden to the prosecutor to articulate race-neutral explanations for striking jurors in question. Since the trial court failed to do so, the defendant's convictions and sentences should be vacated and this matter remanded for a new trial.

As set forth by the majority, when a defendant makes a *Batson* challenge, claiming that the State has used peremptory challenges in a manner which violates the constitution, the defendant must first make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race.

If the defendant fails to make a *prima facie* case, then the challenge fails. *State v. Green,* 94-0887, p. 24 (La.5/22/95), 655 So.2d 272, 287-288. If a *prima facie* case is established, the burden then shifts to the State to come forward with a race-neutral explanation for its peremptory challenges. *Green,* 94-0887 at p. 25, 655 So.2d 288.

A defendant satisfies the requirement of establishing a *prima facie* case by producing evidence sufficient to permit the trial court to draw an inference that discrimination has occurred. *Johnson v. California,* 545 U.S. 162, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005). The defendant may offer any facts relevant to the question of the prosecutor's discriminatory intent, including but not limited to a pattern of strikes by a prosecutor against members of a suspect class, statements, or actions of the prosecutor which support an inference that the exercise of peremptory strikes was motivated by impermissible considerations, the composition of the venire and of the jury finally empaneled, and any other disparate impact upon the suspect class which is alleged to be the victim of purposeful discrimination. *Green,* 94-0887 at p. 24, 655 So.2d at 288.

In this case, the minutes reflect that forty-seven prospective jurors were sent from the trial court's jury management office to the courtroom for the defendant's trial. The *voir dire* began with the trial court screening the panel to identify jurors who did not meet the legal requirements for jury service or who

claimed that service on the jury would result in extreme hardship, and as a result of that questioning, two of the jurors were released by the trial court, without objection by the prosecutor or defendant. The record does not disclose the race of these two jurors.

Next, the trial court randomly selected a panel of fourteen potential jurors, four of which were African-Americans. The defense and the prosecutor addressed the panel and questioned the jurors as a group and individually. At the conclusion of this questioning, two of the African-American potential jurors were challenged by the prosecutor for cause, which the trial court granted, and the two remaining African-American potential jurors were peremptorily challenged by the prosecutor. Four Caucasians were selected for service on the jury.[1]

The trial court then randomly selected another panel of fourteen potential jurors, seven of which were African-American. At the conclusion of the questioning of this panel, three of the African-American potential jurors were challenged by the prosecutor for cause, which the trial court again granted, and the remaining three African-American

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[1] The defense peremptorily challenged four Caucasians. Upon doing so, the prosecutor raised a reverse-*Batson* challenge. The trial court denied the reverse-*Batson* challenge as premature.

potential jurors were peremptorily challenged by the prosecutor. One African-American and four Caucasians were selected for service on the jury.

At this point in the proceeding, counsel for the defendant made a *Batson* objection,[2] and noted that, up to that point in the proceeding, the prosecutor had used all (or five out of five) peremptory challenges to exclude African-Americans from the jury, and further noted that of the nine jurors that had already been seated, only one was African-American and the other eight were Caucasians, and that such a ratio was not in proportion to the racial make-up of the City of Baton Rouge and/or Parish of East Baton Rouge. The trial court deferred ruling on the *Batson* challenge and reserved the rights of both the State and the defense to argue the merits of the challenge at a later time.

The trial court then randomly selected another panel of fourteen potential jurors, six of which were African-American. At the conclusion of the questioning of this panel, two of the African-American potential jurors were challenged by the prosecutor for cause, which the trial court again granted, and the remaining three African-American potential jurors

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[2] The defendant's *Batson* challenged [sic] was raised in conjunction with the prosecution's reurging of its previous reverse-*Batson* challenge. The reverse-*Batson* challenge was denied by the trial court, and no issues have been raised on appeal with regard to the trial court's rulings in this regard.

were peremptorily challenged by the prosecutor. One African-American was peremptorily challenged by the defense. Three Caucasians were selected for service on the jury.

The remaining three potential jurors from the potential jury pool – all Caucasians, were then questioned. The State then exercised two "back-strikes" – one to a Caucasian selected from the second panel and one to a Caucasian selected from the third panel, and the jury selection process was then concluded. The jury ultimately comprised of eleven Caucasians and one African-American and one alternate juror, a Caucasian.

The trial court then recessed the trial until the following morning. The next morning, prior to the commencement of the trial, counsel for the defense re-urged his previous *Batson* challenge to the selection of the jury that the trial court had previously deferred. The trial court denied the motion on the basis that the defendant had failed to establish a *prima facie* case that the prosecutor had exercised peremptory challenges on the basis of race, and therefore, never asked the State to provide race-neutral explanations for the exclusion of the eight African-Americans from the jury. This was erroneous.

According to the record, the jury venire consisted of forty-seven potential jurors, of which seventeen (or 36%) were African-American. Of the seventeen African-Americans, ten survived challenges for cause.

The prosecution then used peremptory challenges to strike eight, and only one African-American was selected for service on the jury. When counsel for defense first raised the *Batson* challenge, the prosecutor had used *five out of five* of his peremptory challenges to exclude potential jurors that were African-American. And by the conclusion of the third panel, the prosecutor had used *eight out of eight* of his peremptory challenges to exclude potential jurors that were African-American. While our supreme court has recently questioned whether "numbers alone" is sufficient to establish a *prima facie* showing of discrimination, *see State v. Juniors,* 2003-2425 (La.6/29/05), 915 So.2d 291, the numbers in this case clearly demonstrate a pattern of strikes by the prosecutor against African-Americans. Moreover, the fact that after all but one of the African-Americans had been excused from the jury pool, the prosecutor then choose [sic] to exercise "backstrikes" against Caucasians that the prosecutor had already accepted (thereby changing the prosecutor's ratio of peremptory strikes against African-Americans to eight out of ten) supports the inference that his previous exercise of peremptory strikes solely against African-Americans was motivated by impermissible racial considerations. Because this evidence is sufficient to draw an inference that discrimination has occurred, the defendant established a *prima facie* case that the

prosecutor in this case was exercising peremptory challenges on the basis of the potential juror's race. The trial court erred in concluding otherwise.[3]

Thus, I respectfully dissent.

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[3] Moreover, to the extent the trial court stated, in denying the *Batson* challenge, that even if there was a *prima facie* showing of racial discrimination, that it found that the peremptory challenges made by the State were "done in a race-neutral fashion" was also erroneous and inappropriate. If the trial court found that the defendant made a *prima facie* showing of discrimination, the trial court should have immediately moved to the second step in reviewing process for a *Batson* challenge and asked the prosecutor to justify his use of eight peremptory strikes against eight African-American prospective jurors with race-neutral reasons. The trial court failed to do so, and instead, concluded *on its own* and without reasons articulated by the prosecutor that the prosecutor's use of peremptory challenges was race-neutral. Such a ruling was not a proper analysis of the defendant's *Batson* challenge.

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA NO. 2009-KD-2038

VS.

SHAWN DRAKE

IN RE: Drake, Shawn; – Defendant; Applying For Supervisory and/or Remedial Writs, Parish of E. Baton Rouge, 19th Judicial District Court Div. H, No. 9-02-168;

November 20, 2009

Stay lifted. Writ denied.

CDK
JPV
JTK
JLW
GGG

JOHNSON, J., would grant.

JONES, J., would grant.

Supreme Court of Louisiana
November 20, 2009

/s/ Jeffrey Collins
Chief Deputy Clerk of Court
For the Court

STATE OF LOUISIANA	*	**NUMBER 09-02-0168**
	*	**SEC. 1**
VERSUS	*	
SHAWN DRAKE	*	**19TH JUDICIAL DISTRICT COURT**
	*	
	*	**PARISH OF EAST BATON ROUGE**
	*	**STATE OF LOUISIANA**

MOTION FOR PRODUCTION

NOW COMES defendant **Shawn Drake** who moves for the District Attorney to produce the following:

1. All contemporaneous notes prepared by Jeff Traylor or any other assistant district attorney pertaining to jury selection in the matter of State of Louisiana v. Shawn Drake, Number 09-02-0168, held June 30, 2003 and July 1, 2003 in the possession of Jeff Traylor or any other assistant district attorney who participated at the trial of this matter;

2. Any jury questionnaires pertaining to jury selection in the matter of State of Louisiana v. Shawn Drake, Number 09-02-0168, held June 30, 2003 and July 1, 2003 in the possession of Jeff Traylor or any other assistant district attorney who participated at the trial of this matter.

Wherefore, defendant prays that this motion for production be granted or that the State of Louisiana

be ordered to appear and show cause why it should not be ordered to comply.

Respectfully submitted,

/s/ Mark D. Plaisance

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Assistant Public Defender

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STATE OF LOUISIANA	*	**NUMBER 09-02-0168**
	*	**SEC. 1**
VERSUS	*	
SHAWN DRAKE	*	**19TH JUDICIAL DISTRICT COURT**
	*	
	*	**PARISH OF EAST BATON ROUGE**
	*	**STATE OF LOUISIANA**

ORDER

CONSIDERING THE FOREGOING:

IT IS ORDERED that Jeff Traylor, Assistant District Attorney for East Baton Rouge Parish show cause on the ___ day of _____, 2009, at ___ a.m. why the District Attorney should not be ordered to produce the requested information.

Baton Rouge, Louisiana, this ___ day of _____, 2009.

/s/ _____

JUDGE ANTHONY MARABELLA
19TH JUDICIAL DISTRICT COURT

CERTIFICATE OF SERVICE

I certify that I have provided the Assistant District Attorney for the Parish of East Baton Rouge a copy of this Motion on this 27th day of August, 2009, by hand delivery.

/s/ Mark D. Plaisance
MARK D. PLAISANCE

Supreme Court, U.S.
FILED
APR 20 2010
OFFICE OF THE CLERK

No. 09-998

In The Supreme Court of the United States

SHAWN DRAKE,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

PETITIONER HAS FAILED TO STATE "COMPELLING REASONS" FOR REVIEW ON CERTIORARI PURSUANT TO SUPREME COURT RULE 10.

Petitioner herein points to the "wide spectrum of procedural approaches," employed by various courts across the country, both state and federal, in applying the principles of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), as evidence that: "These uneven approaches fail to adequately ensure compliance with the principles of *Batson* and result in a conflict between the states and the federal courts." (Petition, pp. 5-6.) Presumably, this Court disagrees. In the nearly quarter of a century since *Batson* was handed down, not once has this Honorable Court granted certiorari to scrutinize the *procedures* applied by the trial court, either during trial or upon remand, when presented with a *Batson* objection. Furthermore, this Court in *Batson* clearly *anticipated* that diverse procedural approaches would be utilized to carry out this Court's pronouncement. As such, there is no "conflict between the states and federal courts" as alleged by petitioner.

In *Batson v. Kentucky*, this Court stated in pertinent part:

> Nor are we persuaded by the State's suggestion that our holding will create serious administrative difficulties. In those States applying a version of the evidentiary standard we recognize today, courts have not

> experienced serious administrative burdens, and the peremptory challenge system has survived. ***We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutors' challenges.*** (Emphasis added.)

In a footnote, this Court noted, "In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today." With regard to the case at bar in *Batson*, this Court remanded "this case for further proceedings. If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his actions, our precedents require that petitioner's conviction be reversed."

In this instance, the Supreme Court of the State of Louisiana has already found a prima facie case of purposeful discrimination, which leaves only for the prosecutor to come forward with his race-neutral explanations. As clearly indicated by this Honorable Court, the manner in which this task is accomplished is within the sound discretion of the trial court.

This Honorable Court's policy of deferring to the trial court on procedural matters in the context of a *Batson* challenge, has been carried forward in the evolution of *Batson*. In *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), this Honorable Court held that a white defendant in a criminal

case "can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race." Therein, this Court reiterated that: "***It remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice.***" (Emphasis added.)

In *Edmonson v. Leesville Concrete Company, Inc.*, 500 U.S. 614, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), this Court held that "courts must entertain a challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial." This Court concluded:

> It remains to consider whether a prima facie case of racial discrimination has been established in the case before us, requiring Leesville to offer race-neutral explanations for its peremptory challenges. In *Batson*, we held that determining whether a prima facie case has been established requires consideration of all relevant circumstances, including whether there has been a pattern of strikes against members of a particular race. The same approach applies in the civil context, ***and we leave it to the trial courts in the first instance to develop evidentiary rules for implementing our decision.*** (Emphasis added.) (Citations omitted.)

More recently, in *Johnson v. California*, 545 U.S. 162, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005), while

concluding that "California's 'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima face case," this Honorable Court reiterated "that States ***do have flexibility in formulating appropriate procedures to comply with Batson***. . . ." (Emphasis added.)

Despite this Court's entrenched policy of deference and flexibility, petitioner avers that:

> . . . because of the passage of time and because the prosecutor has the opportunity to create race-neutral reasons that are not contemporaneous with a peremptory strike, ***the defendant should be always entitled to cross examine the prosecutor and have access to the prosecutor's notes***. The procedure should be uniform among the country's courts, not merely available based upon geographic location. (Petition, p. 7.) (Emphasis added.)

Petitioner herein was convicted on July 2, 2003. Because petitioner herein won an out-of-time appeal on post-conviction relief, his *Batson* claim was finally resolved on April 13, 2009, when the state's application for a rehearing was denied by the Supreme Court of the State of Louisiana. The hearing ordered on remand from the state's highest court was first set to take place on June 8, 2009, nearly a year ago, but was continued at the request of defense counsel. (The *Batson* hearing is presently set for April 30, 2010.) As such, the lapse of time between trial and remand in this matter was less than six years. This lapse of time

is not an unusual occurrence. The passage of time from the trial in *Batson v. Kentucky* to the remand was two years. Approximately four years and three and one-half years had elapsed between trial and remand in *Powers v. Ohio* (Brief for Petitioner, 1985 WL 667872) and *Edmonson v. Leesville Concrete Company, Inc.* (Joint Appendix, 1990 WL 10023007, Brief for Respondent, 1990 WL 505495), respectively.

In *Johnson v. California*, the petitioner was convicted in 1998 and remanded by this Honorable Court in 2005, a period of time in excess of the lapse in the case at bar. Clearly, this Court did not find these circumstances to warrant special instructions to the trial court on remand. On remand, the petitioner argued that he should receive a new jury trial because "too much time has elapsed since the jury selection, which concluded in December 1998, between seven and eight years ago." *People v. Johnson*, 38 Cal.4th 1096, 136 P.3d 804, 45 Cal.Rptr.3d 1 (2006). The Supreme Court of California disagreed, citing remands from various federal courts in cases in which a comparable amount of time had elapsed. The California court further noted that: "In this case, the court and parties have the jury questionnaires and a verbatim transcript of the jury selection proceeding to help refresh their recollection. The prosecutor may have notes he took during the jury selection process." This is true of the case at hand as well.

Petitioner further argues, citing this Court's decision in *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), that because "the

trial judge's findings in the context under consideration here largely will turn on evaluation of credibility . . . ," the prosecutor should in all cases be placed under oath and subject to cross-examination. (Petition, p. 7) In another case cited by petitioner herein, *Gray v. Maryland*, 317 Md. 250, 562 A.2d 1278 (Md. 1989) (Petition, p. 9), the defendant also requested that the prosecutor be placed under oath and subject to cross-examination at step two of the *Batson* analysis. The prosecutor objected, arguing that "it was neither necessary nor appropriate to place the prosecutor under oath or to subject him to cross-examination." The trial court agreed and quashed the subpoena. The Maryland Supreme Court found no abuse of discretion. Among the reasons for its ruling, the Maryland court noted that the prosecutor is an officer of the court, and that:

> Rule 3.3 of the Maryland Lawyers' Rules of Professional Conduct requires that '[a] lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal.' We have said that 'no moral character qualification for bar membership is more important than truthfulness and candor.' A trial judge calling upon the prosecutor to explain his challenges has every right to expect total candor without resorting to the administration of an oath. (Citations omitted.)

Similarly, Louisiana's Rules of Professional Conduct require, in Rule 3.3, that "A lawyer shall not knowingly: make a false statement of fact or law to a

reversal and new trial," noting defendant's misplaced reliance on California law:

> [D]evelopments since our most recent refusal to order a limited remand, including especially the high court decision in this case, convince us that we should now adopt the federal approach . . . The error in *Snow*, and cases it cited was one of state law. The error here was a federal constitutional violation.

The California high court thus rejected the applicability of these cases in their entirety to a *Batson* situation.

In fact, the *only* cases petitioner has cited wherein the court has found that the prosecutor is *always* subject to cross-examination in a *Batson* hearing are two cases out of the State of Texas. In *Williams v. State*, 767 S.W.2d 872 (1989), an intermediate appellate court, in approximately two pages, boldly and unceremoniously proclaimed that the prosecutor is *always* subject to cross-examination on his race-neutral reasons. In *Salazar v. State*, 795 S.W.2d 187 (1990), the Court of Criminal Appeals of Texas, citing the *Williams* case, held that *Batson* hearings should be held in open court, that the prosecutor is subject to cross-examination on his race-neutral reasons, *and* that the state was obliged to produce its "juror information notes." While opinions may differ regarding the propriety of these decisions (see the twenty-two pages of dissent in *Williams*, as well as the dissent in *Salazar*), at the end of the day, it was within the discretion of these state courts to

"formulate particular procedures to be followed" in those cases. *See Batson v. Kentucky.*

Petitioner also cites the Florida case of *Marshall v. State*, 593 So.2d 1161 (Fla. 2d DCA 1992). In that case, an intermediate appellate court in Florida remanded to the trial court with instructions to "conduct a full evidentiary hearing" at which: "The prosecutor who exercised the peremptory challenges must testify under oath concerning the actual reasons she relied on to exercise these challenges. . . ." However, this case addresses ***not the procedure to be employed in a Batson hearing, but, the procedure to be employed in a "Neil" inquiry, a creation of Florida law.*** Notably, in *State v. Neil*, 457 So.2d 481 (Fla. 1984), which predates *Batson*, the court made clear that, "Because the United States Supreme Court has not ruled on this issue, ***we prefer to rely on our state constitution instead of engaging in an analysis of federal constitutional issues.***" (Emphasis added.) This explains the *Marshall* court's stated purpose of assuring "a remedy equal to ***or greater than that provided in Batson***. . . ." (Emphasis added.) In any event, while that court held that on remand, the prosecutor "must testify under oath," there was no corresponding order that the prosecutor thereafter be subject to cross-examination by defense counsel.

Petitioner purportedly cites from "Wigmore on Evidence" that: "Cross-examination of the prosecutor is appropriate because it enjoys an exalted position in the adversary system of justice and is the 'greatest

legal engine ever invented for the discovery of the truth.'" (Petition, p. 10.) This quote is actually taken from *Gray v. Maryland*, 317 Md. 250, 562 A.2d 1278 (1989), which states that cross-examination *in general* enjoys an exalted position, *not specifically cross-examination of a prosecutor.*

Petitioner further avers that, "The prosecutor enjoys no special privilege as a witness." This is not entirely true in Louisiana. The practice of calling lawyers, and, more specifically, prosecutors, as witnesses, is clearly disfavored in Louisiana. La. Code Evid. Art. 507 states in relevant part as follows:

> **Art. 507. Subpoena of lawyer or his representative in criminal cases**
>
> **A. General rule.** Neither a subpoena nor a court order shall be issued to a lawyer or his representative to appear or testify in any criminal investigation or proceeding where the purpose of the subpoena or order is to ask the lawyer or his representative to reveal information about a client or former client obtained in the course of representing the client unless the court after a contradictory hearing has determined that the information sought is not protected from disclosure by any applicable privilege or work product rule; and all of the following:
>
> (1) The information sought is essential to the successful completion of an ongoing investigation, prosecution, or defense.

(2) The purpose of seeking the information is not to harass the attorney or his client.

(3) With respect to a subpoena, the subpoena lists the information sought with particularity, is reasonably limited as to subject matter and period of time, and gives timely notice.

(4) There is no practicable alternative means of obtaining the information.

The information which petitioner seeks, i.e., the state's voir dire notes, as well as the prosecutor's mental impressions and trial strategy with respect to voir dire, are clearly protected from disclosure by the work product rule in Louisiana. Additionally, the information sought is *not* essential to the defense, given the trial court's intention to review the prosecutor's notes in camera if the need arises. Furthermore, the Louisiana Code of Criminal Procedure provides, in relevant part, as follows:

> **Art. 723. State reports and other matters not subject to disclosure**
>
> Except as provided in Articles 716, 718, 721, and 722, this Chapter does not authorize the discovery or inspection of reports, memoranda or other internal state documents made by the district attorney or by agents of the state in connection with the investigation or prosecution of the case; or of statements made by witnesses or prospective

> witnesses, other than the defendant, to the district attorney, or to agents of the state.

The Supreme Court of the State of Louisiana, in *State v. Rey*, 351 So.2d 489 (1977), recognized the foregoing provision as the codification of the "work product privilege." The state supreme court later discusses the scope of this privilege in *Hodges v. Southern Farm Bureau Casualty Insurance Company*, 433 So.2d 125 (La. 1983):

> Whereas the attorney-client privilege protects only confidential communications, ***the opinion work product doctrine may encompass any writing prepared in anticipation of litigation by the attorney*** . . . The purpose of the work product doctrine is not merely to assist the client in obtaining complete legal advice, but also to afford the attorney a 'zone of privacy' within which he is free to evaluate and prepare his case without adversarial scrutiny. (Emphasis added, citations omitted.)

In a footnote, the Supreme Court of the State of Louisiana cited Justice Murphy of this Honorable Court, in *Hickman v. Taylor*, 329 U.S. 495, 91 L.Ed. 451, 67 S.Ct. 385 (1947), who explained the rationale for the rule:

> Historically a lawyer is an officer of the court and is bound to work for the advance of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy,

> free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and necessary way in which lawyers act within the framework of our system of jurisprudence to promote and protect their client's interest. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways – aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer.'

The work product rule in Louisiana, as codified in Louisiana Code of Criminal Procedure Article 723, appears to be absolute, mandatory, and subject only to the very limited exceptions of the discovery of statements of the defendant, his coconspirators, and confessions of codefendants. In addition, Louisiana Code of Criminal Procedure Article 718 states as follows:

> **Art. 718. Documents and tangible objects**
>
> Subject to the limitation of Article 723, on motion of the defendant, the court shall order the district attorney to permit or authorize the defendant to inspect, copy, examine, test scientifically, photograph, or

> otherwise reproduce books, papers, documents, photographs, tangible objects, buildings, places, or copies or portions thereof, which are within the possession, custody, or control of the state, and which:
>
> (1) are favorable to the defendant and which are material and relevant to the issue of guilt or punishment, or
>
> (2) are intended for use by the state as evidence at the trial, or
>
> (3) were obtained from or belong to the defendant.
>
> The court may determine whether evidence is subject to the provisions of Paragraph (1) hereof by in camera inspection.

It has not been suggested that any of the foregoing exceptions apply. As such, applying Louisiana law, the trial court in this matter properly denied petitioner's request for the prosecutor's voir dire notes, which very ***clearly*** fall within the purview of "attorney work product." The Louisiana Court of Appeal, Fifth Circuit, in *Trenticosta v. Mamoulides*, 93-CA-621 (La. App. 5th Cir. 2/23/94), 633 So.2d 786, specifically held the district attorney's voir dire notes to be work product. Although the request in that case was made pursuant to the Louisiana Public Records Act, the court's finding is nonetheless relevant: " . . . we conclude the following items listed as being retained ***are not subject to disclosure via the Work Product Rule: . . . (c) Item No. 13 . . . Jury panel,***

jury list and Assistant District Attorney's notes for voir dire . . . " (Emphasis added.)

It is against this backdrop of Louisiana law that the trial court has adopted a procedure in this matter that will test the veracity of the prosecutor's race-neutral reasons without violating the sanctity of the attorney work product. That procedure involves an in camera inspection of the state's notes, if the race-neutral reasons given are not apparent on the face of the record. The state has not objected to this proposed procedure, which it submits strikes the proper balance between protecting the rights of both the state and the defendant.

Lastly, petitioner cites *Rosa v. Peters*, 36 F.3d 625 (7th Cir. 1994), stating, "Courts have found that given the passage of time, even a hearing to determine whether jurors were improperly excluded may well be unsatisfactory. In those circumstances in which the court determines a hearing cannot be satisfactory for determining the issue, the defendant should get a retrial." The passage of time in *Rosa* was in excess of six years. The State of Louisiana would simply clarify that the United States Court of Appeals, Seventh Circuit, while noting that a post-trial hearing in that case "may well be unsatisfactory," properly left it to the discretion of the district court on remand to "decide if a hearing would be productive; if so, the district court should conduct a *Batson* hearing." The state also wishes to make perfectly clear that petitioner herein has not requested a retrial, either in this court or in any court below.

For nearly twenty-five years, this Honorable Court has left to the trial courts the task of implementing *Batson*. Petitioner has not shown this policy to be unworkable. In fact, the jurisprudence cited by petitioner would indicate otherwise. It would appear that courts across the country have not hesitated to exercise their discretion in fashioning particular procedures when faced with a *Batson* objection, either at trial or on remand.

Furthermore, petitioner is not without a remedy if he is in disagreement with the final outcome of his *Batson* claim. This Honorable Court very recently reversed a Louisiana Supreme Court judgment rejecting the defendant's *Batson* claim, finding that, based upon the record, the prosecutor's race-neutral reasons for striking a black prospective juror were pretextual. *Snyder v. Louisiana*, 552 U.S. 472, 128 S.Ct. 1203 (2008).

CONCLUSION

For the foregoing reasons, the state respectfully requests that this court deny petitioner's application for writ of certiorari.

Respectfully submitted,

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